United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6120

To be argued by: Patrick J. Glynn

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

P/S

ALBERT M. BILLITERI,

Plaintiff-Appellee,

v.

UNITED STATES BOARD OF PAROLE and MEMBERS OF THE UNITED STATES BOARD OF PAROLE, Individually and in Their Official Capacity, and UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of New York

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES

1. Whether the district court had jurisdiction.

2. Whether the Board of Parole, in passing on an application for parole, may consider the narrative description of the prisoner's offense behavior as set out in the presentence report.

3. Whether the district court exceeded its authority in ruling that the Board of Parole had failed to present sufficient evidence to justify a denial of parole.

STATEMENT OF THE CASE

This appeal is taken from an order of the United States District Court for the Western District of New York, the Honorable John T. Curtin, District Judge, requiring the release of the plaintiff from prison. Billiteri v. Board of Parole, 400 F.Supp. 402 (W.D. N.Y. 1975). The plaintiff claimed and the district court held, after a de novo hearing, that the United States Board of Parole had denied plaintiff proper parole consideration because it had considered the circumstances of plaintiff's offense behavior beyond the terms of his plea of guilty to a conspiracy charge. After the hearing held in this matter, the court ordered the plaintiff released on parole.

STATEMENT OF FACTS

An indictment was returned against plaintiff, Albert Billiteri, on December 9, 1970, charging him with two counts of making extortionate extensions of credit in violation of 18 U.S.C. § 892, two counts of using extortionate means to collect extensions of credit in violation of 18 U.S.C. § 894, and one count charging conspiracy to make and collect extortionate extensions of credit in violation of 18 U.S.C. § 371. On May 24, 1972, Billiteri

pleaded guilty to the conspiracy count. The substantive counts were then dismissed on the motion of the government. (App. 527). On July 5, 1972, the late Chief Judge John O. Henderson imposed a fine of $10,000 and a sentence of 5 years imprisonment, the maximum penalty allowable under the conspiracy statute.

Billiteri was confined at the United States Penitentiary, Lewisburg, Pennsylvania, for service of his sentence. Following a parole hearing in February, 1974, the Board of Parole denied Billiteri's application for parole and ordered that his confinement be continued to the expiration of his sentence. The reason stated for the parole denial was that Billiteri's release at that time "would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society." (App. 11). Billiteri subsequently commenced this litigation, claiming that the Board had failed to give an adequate reason for parole denial. (App. 7). The government's answer to the initial complaint included an affidavit which explained the reasoning for the parole denial more fully but which erroneously stated that Billiteri had been convicted of both conspiracy and extortion. Because of this error, the district court on November 25, 1975, ordered the Board to conduct a new parole hearing and indicated that the reason previously given for parole denial would not be sufficient. Billiteri v. Board of Parole, 385 F.Supp. 1217 (W.D. N.Y. 1974)(Billiteri I) (App. 41).

A new parole hearing was conducted by a hearing examiner panel in accordance with the Board's regulations, and the decision of the panel was to refer the case to the Board Members as an original jurisdiction matter because of information that Billiteri had been involved in organized crime. [1/] Before the Board Members met to

1/ The regulation for original jurisdiction cases, 28 CFR § 2.17, as written at that time provided:

> § 2.17 Original jurisdiction cases.
>
> (a) A Regional Director may designate certain cases to be within the original jurisdiction of the Regional Directors. All original jurisdiction cases shall be heard by a panel of hearing examiners who shall follow the procedures provided in § 2.12. A summary of this hearing and any additional comments that the hearing examiners may deem germane shall be submitted to the five Regional Directors. The Regional Directors shall make the original decision by a majority vote.
>
> (b) The following criteria will be used in designating cases for the original jurisdiction of the Regional Directors:
>
> (1) National security. Prisoners who have committed serious crimes against the security of the nation, e.g., espionage or aggravated subversive activity.
>
> (2) Organized crime. Persons who the Regional Director has reason to believe may have been professional criminals or may have played a significant role in an organized criminal activity.
>
> (3) National or unusual interest. Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial or prisoner status, or because of the community status of the offender or his victim.
>
> (4) Long-term sentences. Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

decide his case, however, Billiteri filed a new complaint in the same court, claiming that the Board had improperly considered the allegations of organized crime involvement. (App. 54). But when the Board met to decide the case, it first evaluated Billiteri with reference to its guidelines, 28 CFR § 2.20, as having a very high offense severity and a salient factor score of 8. Under the guidelines the Board's usual policy in such cases is to order release after service of 36 to 45 months imprisonment for adult cases with good institutional performance. Billiteri's 5 year sentence was scheduled to expire, with deductions for good time, after service of only 40 months. After considering all of the other factors in the case, except the allegations of organized crime involvement, the Board decided that an earlier release was not warranted and an order was issued which again continued Billiteri to the expiration of his sentence. The following reasons were stated for the parole denial:

> Your offense has been rated as very high severity. You have a salient factor score of 8. You have been in custody a total of 30 months. Guidelines established by the Board for Adult cases which consider the above factors indicate a range of 36-45 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision below the guidelines at this consideration is not warranted. Your offense behavior is rated very high because it involved extortion which is in the very high severity category of the Board's guidelines.

> Although there is information in your file which alleges involvement in organized criminal activity, the decision to continue your case to expiration was * * * found to be warranted by the other facts in your case, therefore it was not necessary to consider the alleged organized crime involvement in reaching this decision. (App. 124).

Billiteri did not file an administrative appeal of the decision as provided by 28 CFR § 2.25. (App. 199).

Despite the fact that its original order of November 26, 1974, had not specified the procedures to be followed at the parole hearing it ordered, the court, on April 14, 1975, issued another order holding that the proceeding conducted by the Board was inadequate. Billiteri v. Board of Parole, 391 F.Supp. 260 (W.D. N.Y. 1975) (Billiteri II)(App. 142). Therefore, the court decided to conduct a de novo judicial "parole hearing" at which the Parole Board would have the burden of going forward to produce evidence in support of the allegations of Billiteri's organized crime involvement and the rating of his offense behavior in the very high severity category. 2/

Accordingly, a hearing was conducted by the court at which the government presented three witnesses who were admittedly professional criminals. They testified that they had had dealings with Billiteri in the course of their various illegal enterprises. (App. 239 et seq.) The court concluded from this testimony that

2/ Apparently the court disagreed with the Board's conclusion that a placement of Billiteri's offense behavior in the very high severity category would, in light of the other factors in the case, indicate a continuance to expiration and, therefore, obviate the need to consider the aggravating factor of organized crime involvement.

Billiteri was, in fact, a prominent figure in the local organized crime world. Billiteri v. Board of Parole, 400 F.Supp. 402 (W.D. N.Y. 1975)(Billiteri III)(App. 214).

With respect to the issue of offense severity, however, the court ruled that the Board had improperly rated Billiteri's offense behavior as very high. Judge Curtin, thus rejected the Board's affidavit explanation that, since Billiteri's conviction offense, conspiracy, is not an offense listed on the severity scale of the paroling guidelines, his severity rating had to be determined by reference to the narrative description of the offense behavior in the presentence report. That behavior most nearly resembled the very high severity offense of extortion. The court's conclusion that this rating was improper was based, in part, on the reasoning that a convict with a "poor" salient factor score, i.e. 0 to 3, and a similar offense would have a guideline range of 55 to 65 months, which would extend beyond the 5 year statutory maximum sentence for conspiracy. But the court's decision was primarily based on the theory that, because the government prosecutors had agreed to the dismissal of the substantive extortion charges in exchange for a guilty plea to conspiracy, the Parole Board was barred from considering the extortionate conduct described in presentence report and must limit its consideration of offense behavior to the terms of the guilty plea.

The court then proceeded to make its parole decision. The court assigned Billiteri a salient factor score of 0, indicating that he was the worst possible parole risk. [3/] No specific severity rating was determined but the court concluded that since it had twice rejected the "very high" rating, the severity must be lower; and any lower severity rating than "high" [4/] would indicate a guideline range less than the time Billiteri had already served. Therefore, the court ordered the Board to release Billiteri on parole forthwith.

Billiteri was released from prison pursuant to the court's order on September 19, 1975.

ARGUMENT

I. THE COURT LACKED JURISDICTION

In Billiteri I the district court considered the issue of jurisdiction. It concluded that jurisdiction existed under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). 385 F.Supp. at 1218-1219. The court noted that neither plaintiff nor defendant had addressed the jurisdictional question. This holding has served as a jurisdictional predicate throughout this litigation. Defendants contend, however, that the Court erred in accepting jurisdiction under the APA, since (1) this is a habeas corpus case; (2) the APA is not an independent grant of subject matter

3/ This "salient factor score" was not derived from the Parole Board's specific salient factor items in 28 CFR § 2.20 but rather on the court's own clinical judgment of Billiteri.

4/ Presumably the court meant "very high."

jurisdiction; and (3) the APA does not permit the scope of review indulged in by the court.

A. The Court Lacked Jurisdiction to Dispense Habeas Corpus Relief

At no time did the district court consider the propriety of construing this case to be a habeas corpus action. In view of the relief ultimately accorded the plaintiff, this was a fatal error. Habeas principles have admittedly been expanded in recent years, including those relating to the custody requirement and particularly the subject matter which may legitimately serve as a basis for habeas. See Johnson v. Avery, 393 U.S. 483 (1969); Wilwording v. Swenson, 404 U.S. 249 (1971); Kahane v. Carlson, No. 75-2088 (2d Cir. Nov. 26, 1975) (Friendly, J., concurring). But it remains clear that release from confinement presents the most basic habeas corpus issue and must be presented as such. The Seventh Circuit was recently presented with a similar issue and easily concluded that the district court erred in granting relief to prisoners incarcerated outside its district. Bijeol v. Benson 513 F.2d 965 (7th Cir. 1975):

> The gist of petitioners' allegations is that they are being unlawfully subjected to physical restraint by reason of the Parole Board's failure to comply with the statute. Their remedy, therefore, is habeas corpus.

Id. at 967.

The Seventh Circuit then considered the propriety of granting habeas relief outside the district in which the court sat.

> The District Court could properly conclude that in this case a representative action was appropriate, but not, we believe, with respect to prisoners outside the Southern District of Indiana. By so limiting the representative proceeding, we avoid the possibility that respondents, the members of the Board of Parole, whose responsibilities extend throughout the United States, will be subjected even temporarily, to inconsistent judgments by courts of coordinate jurisdiction, and we give the other courts of appeals the respect and comity which are their due.
>
> Id. at 968 (footnote omitted)

Other practical considerations augur in favor of (1) interpreting this to be a habeas action and (2) requiring personal jurisdiction over the habeas custodian. As Judge Friendly recently pointed out:

> The spectacle of the warden of a large federal prison being answerable for prison conditions under § 1361 to district judges scattered from Maine to Hawaii and Florida to Alaska -- an inevitable consequence if § 1361 and the concomitant venue provision entitling a plaintiff to sue in the district of his residence are applicable -- is not a heartening one.
>
> * * *
>
> As far as I have been able to ascertain, only two circuits have assumed jurisdiction over a prisoner's grievance over the conditions of confinement under § 1361 when § 2241 would not also have been available. With respect to the decision of a divided panel utilizing the Fifth Circuit's summary calendar procedure, Ellingsburg v. Connett, 457 F.2d 240 (1972), I find Judge Coleman's dissent, 457 F.2d at 242, much more persuasive than the majority opinion. The decisions of the District of Columbia Circuit, Young v. Director, U.S. Bureau of Prisons, 367 F.2d 331 (1966); Wren v. Carlson, 506 F.2d 131 (1974);

> Starnes v. McGuire, 512 F.2d 918 (1974), seem quite instructive as to the mischief that can be caused by basing jurisdiction on § 1361. Even in petitions not directed, at least in form, against the prisoner's immediate warden, the circuit has found it necessary to attempt to curb the enthusiasm of district judges by ruling that "absent extraordinary circumstances which we need not today delineate, such actions should ordinarily be transferred [to the district of confinement under 28 U.S.C. § 1404(a)] as a mater of course." Young v. Director, supra, 367 F.2d at 332. Enforcing that rule, and filling out the term "extraordinary circumstances," required the court of appeals to develop a complicated list of rules to govern the disposition of what is normally considered a matter for the trial court's discretion. See Starnes v. McGuire, supra, 512 F.2d at 929-33. Included in that list is the consideration that, for cases which "should properly be brought" under § 2241, the district court "must be free to transfer the case" since "we believe that there is no reason in these cases for the court to deviate from the traditional rule that the residence of the immediate custodian (and thus the place of confinement) is the correct forum." 512 F.2d at 931-32. How much more satisfactory it would be to rule that, except in extraordinary circumstances, § 1361 is not available and § 2241 is the exclusive remedy!
>
> Kahane v. Carlson, No. 75-2088 (2d Cir. Nov. 26, 1975) Slip Opinion, at 2-6,7 (Friendly, J., concurring).

We take the view expressed by Judge Friendly. From the standpoint of the potential impact upon the orderly administration of justice, it would be disasterous to permit district courts nationwide to rule on habeas corpus issues based upon the alleged residence of the prisoner prior to incarceration. Moreover, adherence to traditional habeas norms in this regard cannot be considered unwarranted in view of recent Supreme Court decisions discussed infra.

Not only must issues relating to outright release of inmates necessarily be construed as habeas corpus, the requirement that the district court have jurisdiction over the petitioner's immediate custodian must also be retained. This is more than a venue requirement; it concerns the jurisdiction of the court and is not waiveable. 5/

In expanding the scope of habeas in recent years, 6/ the Supreme Court has never departed from the basic principle that the court issuing the writ have jurisdiction over the custodian of the prisoners. Schlanger v. Seamans, 401 U.S. 487, 491 (1971); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 495 (1973). In Schlanger the Supreme Court held that, assuming an Air Force enlisted man was in Air Force "custody" while pursuing an educational project in Arizona, the fact that his commanding officer (i.e., custodian) was not located in Arizona was "fatal to the jurisdiction of the Arizona District Court." Schlanger, supra, 401 U.S. at 491. The court also noted that the venue provisions of 28 U.S.C. § 1391(e) (service of process over federal officers) were inapplicable since"the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction." Id, at 401 U.S. 490, n.4.

5/ Cf. Rule 12(h), Fed. Rules of Civil Procedure.

6/ See e.g., Braden v. 30th Judicial Cir. Court of Ky., 410 U.S. 484 (1973); Hensley v. Municipal Court, 411 U.S. 345 (1973); see generally, Note, Developments in the Law--Federal Habeas Corpus, 83 Harv. L.Rev. 1038 (1970).

Hence, the fact that an inmate like Billiteri can serve the Board of Parole with process in any judicial district is irrelevant. The Board is simply not his custodian in a habeas sense.

In Braden the Court held that a prisoner confined in Alabama could challenge a Kentucky trial detainer in the United States District Court for the Western District of Kentucky despite traditional habeas considerations and certain language in 28 U.S.C. § 2241(a). But this is not a Braden situation. That case involved two distinct sovereigns, each of which exerted certain custodial powers over the prisoner and could, in fact, cause his outright release from their respective "custodies". Moreover, Braden did not seek release from the actual lock and key custody of his Alabama sentence but rather from the intangible "custody" of the Kentucky detainer. In no way did the Braden Court retreat from the basic jurisdictional element of habeas corpus -- that the respondent have the authority to release the prisoner if the writ is granted.

> The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody. . . .
>
> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, supra, 410 U.S. at 494, citing, Wales v. Whitney, 114 U.S. 564, 574 (1885).

In summary we submit that this case presented the district court with an obvious habeas corpus issue - a challenge to the legality of the continued confinement of a federal prisoner. Since Billiteri did not attack the legality of his conviction (a 28 U.S.C. § 2255 question), his remedy lay not in the district where he formally resided or where he was sentenced but in the district of his incarceration.

B. The Administrative Procedure Act Did Not Provide A Basis For Jurisdiction

According to the court below in Billiteri I:

> The Administrative Procedure Act, 5 U.S.C. § 706(2) permits judicial examination of the action of the Board to determine whether or not there has been an abuse of discretion.
>
> Billiteri I, supra, 385 F.Supp. at 1218.

In support of this proposition the Court relied upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974); King v. United States, 492 F.2d 1337 (7th Cir. 1974); Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961); Sobell v. Reed, 327 F.Supp. 1294 (S.D. N.Y. 1971); and Candarini v. Attorney General of the United States, 369 F.Supp. 1132 (E.D. N.Y. 1974). This mixed line of cases, however, hardly resolves the issue since this Circuit has itself grappled with the problem in numerous reported cases. Compare Ove Gustavsson Contracting Co. v. Floete, 278

F.2d 912, 914 (2d Cir. 1960), cert. denied, 364 U.S. 894 (1960) and Wolff v. Selective Service Board, 372 F.2d 817, 826 (2d Cir. 1967)[7/] with Cappadora v. Celebrezze, 356 F.2d 1, 5-6 (2d Cir. 1966). On at least two occasions this Court has specifically noted the fact that it has not been determined whether the APA is an independent grant of subject matter jurisdiction. Aguayo v. Richardson, 473 F.2d 1090, 1102 (2d Cir. 1973); Mills v. Richardson, 464 F.2d 495, 1001 n.9 (2d Cir. 1972). Hence, the district court's reliance upon Citizens to Preserve Overton Park, supra, District of Columbia and Seventh Circuit cases was not justified. But even those decisions have not gone so far as the court below.

In Citizens to Preserve Overton Park the Supreme Court considered a question of judicial review under the APA -- not jurisdiction. The question of whether the APA is an independent source of jurisdiction was not discussed. Rather, the Court merely held that, where a statute's review provisions are not restricted, the APA may be used to fill the procedural gaps. Moreover, the Court noted that judicial review, while generally broad under the APA, is not permissible where there is clear evidence of a contrary legislative intent or where agency action

7/ For cases holding the APA is not an independent grant, see Zimmerman v. United States Gov't, 422 F.2d 326, 330 (3d Cir. 1970), cert. denied, 399 U.S. 911 (1960); Arizona State Dept. of Public Welfare v. Dept. of HEW, 449 F.2d 456, 464 (9th Cir. 1971), cert. denied, 405 U.S. 919 (1971); Dew v. Hardin, 432 F.2d 926 (4th Cir. 1970); Bramblett v. Desobry, 490 F.2d 405 (6th Cir. 1974); but see Sanders v. Weinberger, 522 F.2d 1167, 1169 (7th Cir. 1975).

is committed to its discretion by law. Citizens to Preserve Overton Park, supra, 401 U.S. at 410; see 5 U.S.C. §§ 701(a)(1),(2).

The District of Columbia Circuit cases relied upon by the court below are more apposite but are not the law in this Circuit, since this Court has never held the APA to be an independent grant of subject matter jurisdiction.

The Seventh Circuit in King v. United States, 492 F.2d 1337 (1974) simply held that the United States Board is an agency within the meaning of the APA and, as such, was obligated to give written reasons for parole denial. Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961) held that a prisoner could attack his parole revocation via a declaratory judgment action in the District of Columbia despite the availability of habeas corpus in the district of confinement. In light of the D.C. Circuit's more recent opinions in Starnes v. McGuire, 512 F.2d 918 (1974) and Young v. Director, U.S. Bureau of Prisons, 367 F.2d 331 (1966), the continued viability of Hurley is doubtful. In any event, it apparently was based upon the fact that the Board of Parole "resided" in the District of Columbia and thus could be sued there under normal provisions. It did not consider the fact that "agents" for the Board reside in every judicial district, thus making the Board suable everywhere. Pickus v. United States Board of Parole, 407 F.2d 1107 (D.C. Cir. 1974) simply held that the Board was an agency within the meaning of the APA and, as such, must publish its rules for public comment. The Board has complied. See 40 Fed. Reg. 41328 (Sept. 5, 1975).

In summary, no court has ever conducted parole proceedings like those held here under authority supposedly provided by the APA. Indeed, the proceedings below may be unique under any jurisdictional basis. In any event, reliance upon the APA in this case was erroneous, particularly considering the scope of review undertaken by the district court. Even assuming the APA was somehow relevant, it does not authorize such judicial interference in matters committed to agency discretion. (Further discussion of the proper scope of review is contained in Part III, infra.)

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE PAROLE BOARD COULD NOT CONSIDER THE CIRCUMSTANCES OF THE PLAINTIFF'S OFFENSE BEHAVIOR AS DESCRIBED IN THE PRESENTENCE REPORT.

A. In the Analogous Context of Sentencing, The Court may Inquire Into the Details Of a Defendant's Criminal Behavior Beyond The Strict Terms of the Conviction.

It is well established that in imposing sentence a court may consider a broad range of information about a defendant and need not restrict its inquiry to the proof of the crime established by a verdict or plea of guilty. Although numerous decisions of the state and federal courts have recognized this principle, its rationale is perhaps best explained in the Supreme Court's decision in Williams v. New York, 337 U.S. 241 (1949), upholding the imposition of the death penalty by a judge who had considered, in addition to the evidence presented to the jury, additional information obtained from the court's probation department and other sources. Rejecting the contention that the defendant was entitled to an opportunity for confrontation, cross-examination, and rebuttal, Mr. Justice Black, writing for the Court, held that the formal procedural requirements of the guilt determining process are neither required for nor suited to the broader question of what sentence to impose once guilt has been determined.

> These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from

> being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. 337 U.S. at 247.

The Court in Williams noted that the traditional latitude allowed sentencing judges was manifested in Rule 32 of the Federal Rules of Criminal Procedure, which provides for the consideration of presentence reports containing such information "as may be helpful in imposing sentence. . . ." More recently, Congress specifically referred to the Williams decision as its guide in enacting 18 U.S.C. §3577, which provides that no limitation shall be placed on the information which a court may consider for the purpose of sentencing. See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News, 4007, 4040 (1970).

In the present case the district court indicated that when the government accepts a guilty plea to one count of an indictment and drops the prosecution of the other counts, the Board of Parole (and by implication the sentencing court) may not consider the offenses which were not prosecuted. But this Court has consistently recognized that the principle of Williams v. New York, supra, permits unadjudicated criminal behavior to

be considered in determining the appropriate sanction for an adjudicated crime.[8] In United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), it was held that the sentencing judge properly considered perjury by the defendant as an aggravating factor in the punishment for a narcotics conviction, even though the defendant was not convicted of or formally charged with perjury. In United States v. Needles, 472 F.2d 652 (2d Cir. 1973), the Court upheld the sentencing judge's consideration of offenses charged in dismissed counts of an indictment where the defendant had pleaded guilty to one count. In United States v. Sweig, 454 F.2d 181 (2d Cir. 1972), it was held that the sentencing judge properly considered evidence with respect to crimes of which the defendant had been acquitted. See also United States v. Ciparelli, 401 F.2d 512 (2d Cir. 1968).[9]

8/ Williams itself involved the consideration of unproven criminal behavior.

9/ In other jurisdictions as well, the cases are legion that a sentencing court may consider unadjudicated circumstances of criminal behavior. See, e.g., United States v. Metz, 470 F.2d 1140 (3rd Cir. 1972), cert. denied, 411 U.S. 919; United States v. Majors, 490 F.2d 1321 (10th Cir. 1974); Young v. United States, 259 F.2d 641 (8th Cir. 1958); Jones v. United States, 307 F.2d 190 (D.C. Cir. 1962); United States v. Haygood, 502 F.2d 166 (7th Cir. 1974); Scapolites v. Slate, 50 Ala. App. 120, 277 So. 2d 389 (1973); People v. Burton, 44 Mich. App. 732, 205 N.W. 2d 873 (1973); and United States v. Marcello, 423 F.2d 993 (5th Cir. 1970.

The leading case in this Circuit involving consideration of unadjudicated crimes is United States v. Doyle, 348 F.2d 715 (2d Cir. 1965), cert. denied, 382 U.S. 843, which involved a factual situation very similar to the present case. Like Billiteri, Doyle pleaded guilty to one count of a multi-count indictment, and the remaining counts were dismissed on the government's motion. Although Doyle pleaded guilty only to failing to register 50 shares of stock, the district judge at sentencing made reference to the overall circumstances of the offense, which were described in the presentence report as resulting in the sale of several million shares of unregistered stock. Like Billiteri, Doyle declined to respond to this presentation of the total picture of his conduct and answered that his guilty plea referred to only 50 shares.[10/] On appeal, this Court rejected Doyle's contention that the stock transactions covered by other counts of the indictment should not have been considered:

10/ At the plea proceeding the prosecutor presented a detailed summary of the testimony that the grand jury witnesses LaPorta, Tonhaus, and Spaziani would be able to present as to two instances where Billiteri and Pasquale Napoli made short term loans at a high rate of interest, and then employed threats and assaults in the collection of those loans. (App. 370). Neither Billiteri nor his attorney responded to those statements, but, for purposes of satisfying F.R.Crim.P. 11, Billiteri admitted only that he had made a phone call in furtherance of the conspiracy. Likewise, at the parole hearing in December, 1974, Billiteri was evasive about his actual conduct, stressing the technical limitations of his guilty plea. However, at the parole hearing he did admit that he actually made a loan in furtherance of the conspiracy. (App. 130).

> The narrowing of the indictment to a single count limits the maximum punishment the court can impose but not the scope of the court's consideration within the maximum. The dismissal of the other counts at the Government's request was not an adjudication against it on the merits, even though, as a result of the statute of limitations, no further prosecution can occur for the offenses there charged. The aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it. Its synopsis should include the unfavorable, as well as the favorable, data, and few things could be so relevant as other criminal activity of the defendant, particularly activity closely related to the crime at hand. Counsel suggests that although a "criminal record" may be considered, crimes not passed on by a court are beyond the pale, but we see nothing to warrant this distinction. [Citing Williams v. New York, supra.] Of course much of the information garnered by the probation office will be hearsay and will doubtless be discounted accordingly, but the very object of the process is scope and the defendant is always guarded by the statutory maximum. To argue that the presumption of innocence is affronted by considering unproven criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions. See Williams v. State of Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed. 2d 516 (1959). United States v. Doyle, supra, 348 F.2d at 721.

It is readily apparent that this Court's decision in Doyle and Needles, supra, are in direct conflict with the district court's conclusion that Billiteri's plea bargain precluded any future consideration of the dismissed extortion charges. Furthermore, it is significant that at the plea proceeding the government put on the record a summary of the proof it would be able to present of Billiteri's extending and collecting extortionate loans.[11/] Yet shortly after this presentation and without objection to it Billiteri entered his plea of guilty to the conspiracy charge.

11/ See n. 10, supra.

Billiteri had been forewarned by Chief Judge Henderson that the maximum penalty could be imposed as result of the guilty plea. When the maximum penalty eventually was imposed, the sentencing judge had the benefit of the presentence report which, like the prosecutor's statement, described Billiteri's total offense behavior, including the dismissed charges. Although the record does not show the reasons why Judge Henderson imposed the maximum penalty, the conclusion seems inescapable that he disagreed with Judge Curtin's characterization of Billiteri's involvement as minimal (App. 242).

Finally, a sentencing court's consideration of offense behavior described in dismissed charges does not offend the principles of Santobello v. New York, 404 U.S. 257 (1971). Santobello held only that the prosecution was bound to keep its promise not to recommend a sentence. Obviously a prosecutor could not bind a court or a parole board not to make the full dispositional inquiry found to be essential in Williams v. New York, supra. See also 18 U.S.C. § 3577. If a negotiated guilty plea were held to bar consideration of unadjudicated criminal conduct in the sentencing or parole decision, it would either lead to an abandonment of plea bargaining altogether with a loss of the administrative benefits described in Santobello or it would make the criminal justice system a public sham by requiring that the most serious criminal conduct be ignored.

By allowing dispositional consideration of unadjudicated behavior, plea bargaining under the present system provides for the protection of the public's interest. At the same time it benefits the government's interest in the efficient administration of justice and relieves the defendant of the risk of extremely long consecutive maximum sentences on multiple counts. [1]

[1] For example, if Billiteri had been tried and convicted of all the offenses for which he was indicted he would have been exposed to a possible cumulative maximum fine of $50,000 and sentence of 85 years.

B. The Interests of Justice Require That The Parole Board, Like The Sentencing Court, Consider the Unadjudicated Circumstances Of a Prisoner's Offense Behavior.

Although the differences between the parole decision and the sentencing decision are not to be minimized, there are important similarities which require that the scope of inquiry be approximately the same for both types of dispositions. Both sentencing and parole consideration have the same end: determining whether a convicted defendant should be confined in prison or placed on supervision in the community. Since both types of decisions are involved in the eventual disposition of most prison commitments, both types of decision makers must recognize the same overall purposes of the criminal sanction and must consider the same types of factors to insure that those purposes are effectuated.[13/]

Obviously the Board of Parole as well as the sentencing court must consider the severity of the individual's criminal behavior.[14/]

13/ The general paroling statute expresses the two criteria for parole release in terms which would be equally applicable to the decision whether to impose probation or a prison sentence. The Parole Board must be satisfied (1) that there is a reasonable probability that the prisoner would live and remain at liberty without violating the law and (2) that such release would not be incompatible with the welfare of society. 18 U.S.C. §4203(a).

14/ See Battle v. Norton, 365 F. Supp. 925 (D. Conn. 1973); Application of Wilkerson, 371 F. Supp. 123 (E.D. N.Y. 1973); and Wiley v. Board of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974).

It is essential, therefore, that the Board be permitted to consider the same broad scope of information concerning that behavior as was considered by the court in imposing sentence, including information about unadjudicated criminal offenses. As we have previously asserted, the criminal justice system would be a sham if a sentencing court could not inquire into the actual circumstances of the crime and thus delve behind the guilty plea itself. But the system would also be a sham, though perhaps a less obvious one, if a sentencing court, after taking unadjudicated crimes into account in imposing a strict sentence, has its consideration nullified by a parole board which is precluded from considering aggravating details which go beyond the strict terms of a guilty plea.

With the exception of the present case,[15] every court which has ruled on the Parole Board's practice of considering the unadjudicated details of a prisoner's conduct has upheld that practice. In Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974), the Board had rated Lupa's offense severityin the "very high" category of the guidelines although he had been convicted only of

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15/ It is ironic that even in this case the district court itself considered evidence of unadjudicated crimes when it concluded that Billiteri was a member of organized crime.

conspiracy to transport stolen property in interstate commerce, an offense properly placed in the "moderate" severity category. However, official reports indicated that Lupo had been charged with robbery in connection with the same property but that the robbery charges had been dismissed. The court concluded that the Board could properly consider the unproven robbery in rating Lupo's offense behavior if it advised Lupo that it was doing so either at the parole hearing or in the reasons for parole denial. In that way, Lupo would have an opportunity to respond to the allegation at the hearing or in his administrative appeal.

The Lupo decision was implicitly approved by the Ninth Circuit in Grattan v. Sigler, No. 75-2042 (9th Cir., Aug. 6, 1975) (copy appended), in which the Board had increased the offense severity rating because of the unproven circumstance of Grattan's role as a ringleader in a marijuana distribution scheme. Grattan did not directly challenge the Lupo ruling but claimed that his case was distinguishable because being a ringleader was not a separate crime. The court rejected that argument and held that the unproven aggravating circumstance could be considered by the Board if Grattan was given notice of it.

The case most nearly resembling Billiteri's is Manos v. Board of Parole, 390 F. Supp. 1103 (M.D. Pa. 1975). Manos was convicted of filing false tax reports, having pleaded guilty to two counts of a 22 count indictment. The two counts on which he

was convicted involved less than $20,000, indicating a severity rating in the "moderate" range of the guidelines. The Board, however, looked to the full 22 count indictment charging Manos with preparing false tax reports depriving the government of $150,000 and, therefore, rated the offense as "very high" severity. The district court upheld that rating on the basis of the Lupo decision.

We submit that the Lupo, Grattan, and Manos decisions, provide a better approach to this issue than the decision of the court below. It is especially necessary where the conviction shows only a guilty plea to conspiracy that the Board of Parole be able to look beyond the terms of the plea to determine the true nature of a prisoner's offense behavior.

III. THE DISTRICT COURT ERRED IN RULING THAT THE BOARD OF PAROLE HAD FAILED TO PRODUCE SUFFICIENT EVIDENCE TO JUSTIFY A DENIAL OF PAROLE.

A district court entertaining a habeas corpus petition within its jurisdiction may properly review Parole Board proceedings to determine whether they satisfied applicable procedural requirements or whether they were based on constitutionally impermissible considerations. However, we respectfully submit that the court below exceeded its authority when it conducted its own parole hearing and required the Board of Parole to present its case against paroling Billiteri. We are unaware of a single precedent for this type of proceeding. To the contrary, courts reviewing

parole decisions have scrupulously avoided sitting as "super parole boards". See Brest v. Ciccone, 371 F.2d 981 (8th Cir. 1967); Tarlton v. Clark, 441 F.2d 384 (5th Cir. 1971); Juelich v. Board of Parole, 437 F.2d 1147 (7th Cir. 1971). Indeed, it is difficult to imagine a worse Pandora's box for the courts to open than to conduct de novo parole hearings for dissatisfied prisoners. Not only would there be thousands of new trials each year but each trial would be duplicative of a previous administrative hearing and would produce an atmosphere of continuous uncertainty, with the prisoners alternating between the administrative and judicial process to make new pleas for release.

The information before the Parole Board in this case was sufficient to support an offense severity rating of "very high". The crime of conspiracy is not listed on the Board's guidelines because conspiracy covers many possible varieties of criminal conduct which vary greatly in severity depending on the objective of the conspiracy and the extent to which its aims are accomplished. Here the presentence report clearly contained a factual basis to support the conclusion that Billiteri's offense behavior was, in fact, extortion. The report stated that Billiteri authorized his co-defendant Napoli to loan Joseph La Porta $200 to be repaid in three weeks with $40 interest and that to collect the loan Billiteri poked his hand in La Porta's face, threatened to poke his eyes out,

slapped him, and took money from his wallet. The report also indicated that Billiteri approved a loan of $500 by Napoli to Bernard Spaziani to be repaid in 30 days with $200 interest and then went with Napoli to collect the loan and took Spaziani into the back seat of their car where Napoli obtained a promise of repayment by striking Spaziani six or seven times in the face. (App. 397 et seg.). Had the district court undertaken to review all of the information before the Board as we contend, this description in the presentence report would have been sufficient to warrant the "very high" offense severity rating. But even more evidence of Billiteri's extortionate conduct was presented to the court at its de novo parole hearing. Both the grand jury testimony against Billiteri (App. 446-516) and the prosecutor's uncontested statement at the plea proceeding (App. 370 et seg.) were before the court. In view of this it is clear that Judge Curtin not only exceeded the proper scope of review but also entered findings so clearly erroneous as to require reversal.

Finally, even if Judge Curtin were correct in concluding that Billiteri's offense behavior should have been rated differently, the proper course would have been to order a reconsideration by the Board of Parole. By attempting the parole decision itself, the district court ignored several important points which could have led to a different result. The fact that the offense was part of a professional organized crime operation was an aggravating

factor which could have indicated a severity rating higher than would otherwise be assigned to the offense. 28 C.F.R. § 2.20(d). Alternatively, Billiteri's organized crime involvement could have been viewed as a factor indicating a decision outside the guidelines. 28 C.F.R. § 2.20(c). Or there could have been other factors in the case which would have warranted a decision above the guideline range. Yet the district court dismissed these possibilities, simply because the Board had not previously found it necessary to articulate additional reasons for parole denial. We contend that the Parole Board was not required to state in its reasons every adverse factor in Billiteri's case but that it needed only to state a reason which supported its decision. The failure to state possible alternative grounds for parole denial should not foreclose future consideration of those alternatives.

In summary, the entire method of review conducted by the district court is intolerably at odds with the way the Board of Parole is supposed to function. The court assumed the role of a super parole board by conducting its own parole hearing and directing the real Board to exercise its discretionary paroling power. In so doing the court focused its inquiry on an issue (organized crime), which the real Board had found unnecessary to reach, excluded from consideration information which the real Board found necessary for protection of the public welfare, and then interpreted the real Board's guidelines in such a way as make parole inevitable. As a

result, after more than a year of litigation, the district court held that early parole was required for a proven member of organized crime whom the court found to be the worst parole risk possible.

CONCLUSION

For these reasons the judgment of the district court should be reversed.

Respectfully submitted,

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(AMENDED: OCTOBER 31, 1975)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES PAUL GRATTAN, *Petitioner-Appellant,* vs. MAURICE H. SIGLER, Chairman, United States Board of Parole, United States Bureau of Prisons, *Respondents-Appellees.*	No. 75-2042 OPINION

[August 6, 1975]

On Appeal from the United States District Court
for the Central District of California

Before: ELY and CHOY, Circuit Judges, and SOLOMON,* District Judge

PER CURIAM:

James Grattan pleaded guilty to a charge of possession of marijuana with intent to distribute and was sentenced to five years imprisonment under 18 U.S.C. § 4208(a)(2).

Grattan began to serve his sentence on March 30, 1973, with four months accumulated jail time. On June 16, 1973, Grattan was given a parole hearing before local representatives of the United States Board of Parole (Board). Grattan was told that no recommendation for or against parole would be made locally, but that the decision would be made by the Board of Parole in Washington, D. C. In August, 1973, the Board denied Grattan a parole and set a new hearing in December, 1975. No reasons for the parole denial or the 28 month setoff were given.

*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

When Grattan was imprisoned, he received a "salient factor" rating of 9, or "very good", under the Parole Board's regulations.[1] Grattan obtained a second hearing before local representatives of the Board on October 11, 1974. At this hearing Grattan was told that his offense had been classified in the "very high" offense severity category.[2] Apparently no reason was given for this classification. The Board's regulations provide that a "customary" sentence for a prisoner with a salient factor rating of "very good" and an offense severity rating of "very high" is 26 to 36 months. 28 C.F.R. § 2.20, 39 Fed. Reg. 20031 (June 5, 1974).

After the second hearing, the local hearing officers fixed a tentative parole release date of December 19, 1974. Grattan may have been told of this date orally, but received nothing in writing. The Regional Director of the Board timely referred the decision of the local hearing officers to the National Appellate Board for reconsideration on November 4, 1974, pursuant to 28 C.F.R. § 2.24, 39 Fed. Reg. 20034 (June 5, 1974).[3] Grattan was notified of this action.

The National Appellate Board rescinded the parole date on November 7, 1974, and set a new hearing in August, 1975. The

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[1] A prisoner's "salient factor" is an objective measure of his behavior characteristics. 28 C.F.R. § 2.20, 39 Fed. Reg. 20031-20034 (June 5, 1974), 40 Fed. Reg. 10976-10979 (March 10, 1975); see *Grasso v. Norton*, 371 F.Supp. 171, 173 (D.Conn. 1974). A prisoner with no prior convictions or incarcerations, who is 18 or older, whose offense did not involve auto theft, who has never had parole revoked, who was never dependent on drugs, who has completed high school, who worked or was in school for at least six months of the two years prior to incarceration, and who plans to live with his family when released would receive a maximum "salient factor" of 11.

[2] The regulations of the Parole Board rate offenses according to their relative severity; from "low" (e.g. minor theft) to "greatest" (e.g. wilful homicide, skyjacking). 28 C.F.R. § 2.20, 39 Fed. Reg. 20031-20034 (June 5, 1974), 40 Fed. Reg. 10976-10979 (March 10, 1975).

[3] 28 C.F.R. § 2.24 provides in part:

> "A regional Director may review the decision of any examiner panel and refer the decision, prior to written notification to the prisoner, with his recommendation and vote to the National Appellate Board for reconsideration and any action it may deem appropriate."

notice of the Board's action contained a brief statement of reasons. It noted that the guideline period for a "very high" offense severity rating and a salient factor rating of "very good" was 26 to 36 months. At that time Grattan had served approximately 23 months. The statement included the standard reason provided a prisoner who has not served the time provided by the regulations: ". . . [A] decision outside the guidelines . . . does not appear warranted. There is not a reasonable probability that you would live and remain at liberty without violating the law."

On February 6, 1975, after Grattan exhausted his administrative remedies, he filed a petition for writ of habeas corpus. More than a month later, the National Appellate Board sent Grattan a second statement of reasons in support of its decision to rescind his parole date. It repeated the reasons stated in the first notice and added: "Your offense falls in the 'very high' severity category because you were the ringleader of a very serious commercial marijuana venture."

The District Court denied the petition on the ground that "[t]he Board of Parole possesses broad authority and discretion in making its decisions regarding parole, and the courts are generally powerless to interfere with the Board's actions . . . . [T]he actions taken by the Board of Parole herein were well within its authority and discretion."

Grattan contends that his offense was improperly rated in the "very high" offense severity category. He concedes that other alleged offenses may be considered by the Board when it assigns an offense severity rating to a prisoner's offense. *Lupo v. Norton*, 371 F.Supp. 156, 161-162 (D.Conn 1974). But he argues that the allegation that he was a "ringleader" is not a separate offense and cannot justify an offense severity rating of "very high" because the Board's regulations rate the most serious marijuana offense (sale of marijuana valued at more than $5,000) in the "high" offense severity category. He further argues that the "very high" offense severity category is reserved for offenses which involve the sale of "soft drugs" (presumably cocaine, barbituates, amphetamines, and similar drugs), possession of hard drugs, armed robbery, sexual offenses involving force, and extortion.

In our opinion, the Board's regulations permit the Board to raise Grattan's offense severity rating if he was a ringleader. 28

C.F.R. §2.20, 39 Fed. Reg. 20030 (June 5, 1974).[4] In the peculiar circumstances of this case, when such a charge was used by the Board to increase the offense severity rating, Grattan should have been given such reasonable notice of the change as to enable him to challenge its accuracy. 28 C.F.R. § 2.13(d); *Lupo v. Norton, supra* at 160-61, 162.

Moreover, Grattan was not told why his offense severity rating had been designated "very high" until after he had exhausted his administrative remedies and filed this petition for habeas corpus. This explanation came too late to serve the purpose of the Board's own regulations. In view of the defects in previous Board proceedings in this case, Grattan is entitled to a new hearing to be conducted in accordance with 28 C.F.R. §§ 2.12, 2.13, 40 Fed. Reg. 10974 (March 10, 1975), and during which Grattan is to be allowed to respond to the allegation that he was a ringleader. He should also be permitted to present evidence in mitigation.

Reversed. The District Court is directed to grant the petition unless the Board provides Grattan a new hearing within 60 days.

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[4] 28 C.F.R. § 2.20 provides in part:

"
. . . .
(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics . . . .
(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered . . . .
(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Appellants were mailed to:

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DATED: December 31, 1975

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